

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1421

To be argued by
PAUL VIZCARRONDO, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1421

UNITED STATES OF AMERICA,

Appellee,

—v.—

HOWARD WENDY, ESQ.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America

PAUL VIZCARRONDO, JR.,
ROBERT J. JOSSEN,
Assistant United States Attorneys,
Of Counsel.

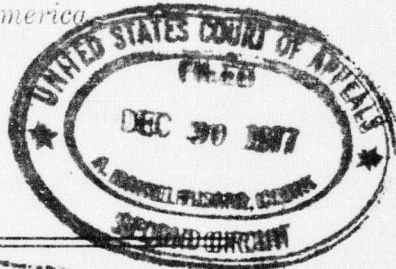


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	1
ARGUMENT:	
POINT I—Wendy was able to comply with Judge Goettel's order to proceed with the trial	6
POINT II—Wendy's conduct warranted the civil con- tempt citations	11
CONCLUSION	15

TABLE OF CASES

<i>Bell v. Hongisto</i> , 501 F.2d 346 (9th Cir. 1974) ...	12, 13
<i>Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co.</i> , 380 F.2d 570 (D.C. Cir.), <i>cert. denied</i> , 389 U.S. 327 (1967)	7
<i>Dunn v. United States</i> , 388 F.2d 511 (10th Cir. 1968)	9
<i>Gompers v. Bucks Stove & Range Co.</i> , 221 U.S. 418 (1911)	7
<i>In re Allis</i> , 531 F.2d 1391 (9th Cir.), <i>cert. denied</i> , 429 U.S. 900 (1976)	12
<i>In re Niblack</i> , 476 F.2d 930 (D.C. Cir.), <i>cert. denied</i> , 414 U.S. 909 (1973)	12
<i>In re Sutter</i> , 543 F.2d 1030 (2d Cir. 1976)	5, 6, 12
<i>International Business Machines Corp. v. United States</i> , 493 F.2d 112 (2d Cir. 1973), <i>cert. de- nied</i> , 416 U.S. 985 (1974)	7
<i>Maggio v. Zeitz</i> , 333 U.S. 56 (1948)	7

	PAGE
<i>Natural Resources Defense Council, Inc. v. Train</i> , 510 F.2d 692 (D.C. Cir. 1975)	7
<i>Penfield Co. v. SEC</i> , 330 U.S. 585 (1947)	7
<i>Shillitani v. United States</i> , 384 U.S. 364 (1966) ...	7
<i>Washington Metro. Area Transit Auth. v. Amalgamated Transit Union Local 689</i> , 531 F.2d 617 (D.C. Cir. 1976)	7
<i>United States ex rel. King v. Schubert</i> , 522 F.2d 527 (2d Cir.), cert. denied, 423 U.S. 990 (1975)	10
<i>United States v. Bentvena</i> , 319 F.2d 916 (2d Cir.), cert. denied, 375 U.S. 940 (1963)	10, 13, 14
<i>United States v. Calabro</i> , 467 F.2d 973 (2d Cir. 1972), cert. denied, 410 U.S. 926 (1973)	10
<i>United States v. Carroll</i> , 510 F.2d 507 (2d Cir. 1975), cert. denied, 426 U.S. 923 (1976)	10, 13
<i>United States v. Daniels</i> , 558 F.2d 122 (2d Cir. 1977)	10
<i>United States v. Lespier</i> , 558 F.2d 624 (1st Cir. 1977)	8, 10, 12, 13, 14
<i>United States v. Llanes</i> , 374 F.2d 712 (2d Cir.), cert. denied, 388 U.S. 917 (1967)	10, 13
<i>United States v. Marx</i> , 553 F.2d 874 (4th Cir. 1977)	12
<i>United States v. Morrissey</i> , 461 F.2d 666 (2d Cir. 1972)	10
<i>United States v. Smith</i> , 436 F.2d 1130 (9th Cir. 1970)	12, 13
<i>United States v. Sperling</i> , 500 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975)	10
<i>United States v. UMW</i> , 330 U.S. 258 (1947)	7

Other Authorities:

18 U.S.C. §§ 3161 <i>et seq.</i>	2, 5, 12
Plan of the United States District Court for the Southern District of New York for Prompt Dis- position of Criminal Cases, Section 5(f)(2) ...	12

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1421

UNITED STATES OF AMERICA,

Appellee,

—v.—

HOWARD WENDY, ESQ.,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Howard Wendy appeals from an order of civil contempt entered on September 6, 1977, in the United States District Court for the Southern District of New York by the Honorable Thomas P. Griesa, United States District Judge. Wendy was found in contempt of the District Court for his refusal to proceed to trial on December 13, 14 and 15, 1976, in the case of *United States v. Herven Harris*, Indictment 76 Cr. 602, as ordered by the Honorable Gerard L. Goettel, United States District Judge. Wendy was fined \$500 for each of the three days he was in contempt of the District Court, for a total of \$1500 in fines. Payment of the fines has been stayed pending this appeal.

Statement of Facts

Indictment 76 Cr. 602, filed on June 29, 1976, charged Herven Harris in one count with evading the payment of his individual federal income tax for the year 1971, in

violation of Title 26, United States Code, Section 7201. Harris was arraigned on the indictment on July 8, 1976, at which time he pleaded not guilty and the case was assigned to Judge Goettel. At the arraignment, Harris was represented by Howard Wendy, Esq., an attorney admitted to practice before the United States District Court for the Southern District of New York. (App. 57a).^{*} Wendy entered a notice of appearance, filed with the court on July 9, 1976, stating that he was Harris' attorney and that he was of the law firm of Kassner and Detsky. (App. 4a).^{**} When the Government filed its notice of readiness on August 16, 1976, a copy was directed to Wendy at the law firm of Kassner and Detsky. (App. 69a).

Thereafter, Judge Goettel held pre-trial conferences in the *Harris* case on August 18, September 7, September 21 and October 12, 1976. At these conferences discovery problems between the parties and the setting of a trial date were discussed. (App. 6a-31a). Wendy alone represented Harris at each of the conferences. At the October 12th conference Judge Goettel determined that, under the provisions of the Speedy Trial Act,^{***} trial of the *Harris* case had to commence by around the end of the year,^{****} and the District Court then set a trial date of December 13, 1976, a date which was agreeable both to Wendy and

^{*} References to Wendy's appendix filed on this appeal are cited as "App."; "Br." refers to appellant's brief on appeal.

^{**} Wendy later filed another notice of appearance on behalf of Harris that was filed with the court on July 19, 1976 and on which he again stated that he was Harris' attorney and that he was of the law firm of Kassner and Detsky. (App. 5a).

^{***} 18 U.S.C. §§ 3161 *et seq.*

^{****} At the October 12 conference, Judge Goettel thought the trial had to begin by December 29, 1976. (App. 31a). In fact, the 180 day period after arraignment within which the trial had to commence expired on January 3, 1977. (App. 53a).

the Government. (App. 31a). At no time during this or any other pre-trial conference did Wendy indicate, either to the trial court or the Government, that someone other than him was to represent Harris at trial.

On December 9, 1976, the Thursday before the trial was scheduled to commence, the Assistant United States Attorney to whom the case was then assigned called Wendy to ask if he would stipulate at trial to the admission of certain records. During that conversation, Wendy for the first time stated that his partner, Herbert Kassner, would try the case with Wendy and that Kassner was engaged in a state court trial that possibly might extend through December 13. The Assistant United States Attorney told Wendy he should call Judge Goettel's chambers immediately and give that information to the district judge's staff. (App. 105a). Prior to the telephone conversation between Wendy and the Assistant the Government never had been informed that Kassner represented Harris and was to participate in the trial. Wendy alone had represented Harris at all proceedings in the case before that day. (App. 35a-37a, 54a).

On Friday, December 10, 1977, Wendy called Judge Goettel's chambers and for the first time informed the Judge's staff of Kassner's involvement in the case, as well as that Kassner's state court engagement would extend through December 13. Wendy asked for a continuance of the *Harris* trial until after Kassner's state court trial was finished. Wendy was told that the trial would begin as scheduled the following Monday. (App. 37a).

On the morning of December 13, 1976, the Government answered ready for the trial of *United States v. Herven Harris*. Wendy, appearing with the defendant, answered not ready and presented an "affidavit of actual engagement" executed by Kassner. In the affidavit, Kassner stated that on December 13, 1976, he would be ac-

tually engaged in a criminal trial in the New York State Supreme Court, that the trial had started on December 8, and that it would probably end on or about December 17, 1976. (App. 33a, 94a).

In response to Wendy's request for a continuance, Judge Goettel stated that he was first told of Kassner's intended participation in the trial and of his state court engagement on December 10, the last business day before the long-scheduled December 13 trial date. The district judge pointed out that Wendy had been attorney of record throughout the proceedings in the case. Judge Goettel further stated that he had scheduled other important cases for the following week and if the *Harris* case could not be tried during the week of December 13 he could not schedule it to be tried before the January 3, 1977 deadline imposed by the Speedy Trial Act. Judge Goettel asked Wendy if he was prepared to proceed with the trial and stated he would fine Wendy \$500 for each day he was not prepared to proceed. Wendy stated that he had never tried a case before, did not believe he was competent to try the *Harris* case, and refused to proceed. Judge Goettel found Wendy in contempt and ordered him to appear ready for trial the next day. In the meantime, the Government was required to pay witness and travel fees for five witnesses, including a witness who had journeyed to New York from North Carolina, who attended court on December 13 in anticipation of the trial starting on that date. (App. 35a-43a).

Wendy and the defendant Harris appeared before Judge Goettel again on the mornings of December 14 and 15, 1976. On each day Wendy refused to proceed with the trial as ordered and Judge Goettel found him in con-

tempt of the court. (App. 60a-61a; 72a, 79a).^{*} After finding Wendy in contempt on December 15, Judge Goettel stated that any further civil compulsion would be meaningless because other commitments would prevent him from starting the trial the next day. At this point, the Government asked the District Court to inquire whether Harris refused to proceed with Wendy's sole representation, in order to warrant an appropriate finding under the Speedy Trial Act for a continuance. In response to Judge Goettel's questions, Harris stated that he was not then prepared to proceed with Wendy as his attorney, and that he preferred to have his trial adjourned until Kassner was available to try it and the court's calendar permitted the case to go forward. Judge Goettel found that under the circumstances a continuance would best serve the ends of justice, *see* 18 U.S.C. § 3161(h)(8)(A), and adjourned the case *sine die*. (App. 79a-80a, 85a-87a).^{**}

Citing this Court's opinion in *In re Sutter*, 543 F.2d 1030, 1033-34 n.4 (2d Cir. 1976), Judge Goettel thereafter referred for assignment to another judge the assessment of fines on Wendy for his contumacious conduct. (App. 97a-98a). The matter was referred to Judge Griesa who, after a hearing, upheld Judge Goettel's fines totaling \$1500. (App. 100a-114a).

^{*} On December 13, Wendy filed with this Court a petition for a writ of mandamus to direct Judge Goettel not to fine or otherwise punish Wendy or hold him in contempt for his refusal to proceed with the *Harris* trial, and to grant an adjournment of the trial for not more than two weeks. On December 15, 1976, this Court denied the petition without opinion. *See* Dkt. No. 76-3082.

^{**} The trial subsequently began on January 4, 1977, with the defendant represented by both Wendy and Kassner. On January 7, the jury acquitted Harris of the single count of tax evasion with which he was charged.

ARGUMENT

POINT I

Wendy was able to comply with Judge Goettel's order to proceed with the trial.

Wendy argues that by reason of inexperience he was unable to comply with Judge Goettel's order to proceed with the *Harris* trial, and thus could not have been cited for contempt. This argument, made by one who at all times held himself out as the attorney of record for Harris and an experienced member of the bars of New York State and of the Southern District of New York, provides no defense on this record to the findings of civil contempt.

As a preliminary matter, Wendy does not dispute that Judge Goettel's findings of contempt were in the nature of civil contempt.* As the record of proceedings in the District Court makes clear, the fines were imposed against Wendy not to punish him for misconduct but to coerce him to comply with the court's order to fulfill his responsibili-

* Although as a technical matter the contempt order from which Wendy appeals was made by Judge Griesa, Wendy in fact was held in civil contempt by Judge Goettel upon his refusal to proceed on the scheduled trial date. Upon the reference of the case to him by Judge Goettel, Judge Griesa reviewed the proceedings thoroughly and found no reason to disturb either the finding of contempt or the amount of the fines imposed by Judge Goettel. Judge Goettel viewed the dicta in this Court's opinion in *In re Sutter*, 543 F.2d 1040, 1033-34 n.4 (2d Cir. 1976), as requiring such a review by another judge of the District Court. While this procedure assured the essential fairness and reasonableness of the determination of contempt, we submit that it was unnecessary since, unlike in *Sutter*, the fines imposed here were not intended to punish Wendy but to force his compliance with the court's orders. The authority of a District Court judge to use the civil contempt power for the latter purpose and to determine himself the appropriate accompanying penalty, subject only to appellate review, has never been questioned. See the text following this footnote and the cases cited therein.

ties and proceed with the trial. As such, the trial court's actions plainly were in the nature of civil contempt. See *Shillitani v. United States*, 384 U.S. 364, 370 (1966); *Penfield Co. v. SEC*, 330 U.S. 585, 590 (1947); *United States v. UMW*, 330 U.S. 258, 303-04 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-42 (1911); *International Business Machines Corp. v. United States*, 493 F.2d 112, 114-15 (2d Cir. 1973), *cert. denied*, 416 U.S. 985 (1974). The coercive, rather than punitive, nature of the orders is underscored by their cessation after December 15 because no purpose would have been served by further attempts to coerce Wendy's compliance with the trial court's directions.

Since a civil contempt citation and fine have no coercive effect if the party held in contempt is unable to comply with court's order,* Wendy conveniently argues that the contempt citations were improper because he was unable to comply with the court's orders due to his inexperience as a trial lawyer and his client's refusal to let Wendy represent him. The first of these contentions simply is unsupported by the record; the second is a mere afterthought and raises a matter never urged by Wendy in the District Court as the basis for his refusal to proceed to trial.

At all times up to the scheduled date of the trial before Judge Goettel, Wendy represented to the court that he was the attorney of record for the defendant and a member of the bar both of New York State and of the Southern District of New York. He was an experienced attorney who was particularly well-versed in tax matters. Wendy

* See *Shillitani v. United States*, 384 U.S. 364, 371 (1966); *Maggio v. Zeitz*, 333 U.S. 56, 69-77 (1948); *Washington Metro. Area Transit Auth. v. Amalgamated Transit Union Local 689*, 531 F.2d 617, 621 (D.C. Cir. 1976); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1975); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co.*, 380 F.2d 570, 581-82 (D.C. Cir.), *cert. denied*, 389 U.S. 327 (1967).

attended all pre-trial conferences in the case and handled all matters of pre-trial discovery on behalf of his client. Thus, at the time Wendy first voiced objection to proceeding to trial as sole counsel, there was nothing before Judge Goettel to indicate that Wendy was anything but a competent and able attorney in good standing with the bar, or that Harris, Wendy's retained client, expected someone else to represent him at the trial. In such circumstances, and particularly where the trial date had been selected months earlier to the mutual satisfaction of both sides, the trial judge was not required to examine Wendy's credentials further before ordering him to proceed to trial. See *United States v. Lespier*, 558 F.2d 624, 628-29 (1st Cir. 1977).

Wendy's present argument thus is reduced to the notion that his belief that compliance with the court's order would have done "a great disservice to his client" (Br. at 8) amounted to an inability to comply with the order. This claim, however, is legally inapposite. While Wendy may have thought the District Court's order unfair or not in his client's best interests, there was no reason why he could not have complied with it. Wendy was a duly licensed and practicing attorney, and there was no legal, physical, mental or other impediment to his trying the case. The mere fact that Wendy may have believed that Kassner, because of his greater experience, perhaps could have tried the case better did not mean that Wendy was unable to try it or that Wendy lacked the basic legal skills to represent his client adequately in court.*

* Even if, as Wendy now asserts, the *Harris* case would have been contemnor's first criminal trial, that fact was no excuse for his refusal to obey Judge Goettel's proper order. Mere inexperience as an attorney in a criminal—as opposed to a civil—proceeding is not equivalent to incompetence or ineffective assistance of counsel. See *United States v. Lespier*, 558 F.2d 624, 628 (1st Cir. 1977). Indeed, Wendy competently handled the pre-trial proceedings in this case and ably assisted Kassner at Harris'

[Footnote continued on following page]

Finally, Wendy argues that he was unable to comply with the District Court's order because his client, Harris, refused to allow Wendy to represent him at trial. This argument is a makeshift one, raised for the first time on appeal in an attempt to excuse Wendy's contumacious conduct. The only support in the record for Wendy's belated claim is in Judge Goettel's questioning of Harris on December 15, *after* the trial judge already had found Wendy in contempt for the third and last time. At the sole request of the Assistant United States Attorney, who wanted to establish a basis for a finding under the Speedy Trial Act that the ends of justice would best be served by granting a continuance of the case, Judge Goettel asked Harris if he was prepared to proceed with Wendy alone as his attorney. Prior to this inquiry, neither Wendy nor anyone else, including the defendant Harris, had suggested that Harris would refuse to proceed to trial with Wendy's exclusive representation.* The focus of

belated trial. Moreover, if Wendy had proved at trial unable to provide Harris with effective assistance of counsel and, as a result, Harris had been convicted, Harris could have sought to have his conviction overturned on that basis by the District Court or on appeal. *See id.* at 629-30. In any event, courts have as great an interest, if not a greater one, as attorneys in protecting the Sixth Amendment rights of defendants, and it was no excuse for Wendy's disobedience to the court's order that he was doing so allegedly to protect the rights of his client. "Devotion to a client is no excuse for the violation of a court order." *Dunn v. United States*, 388 F.2d 511, 513 (10th Cir. 1968).

* In an affidavit dated December 15 and filed with this Court on that day in support of Wendy's petition for a writ of mandamus, Wendy stated that Harris had told him that "he wished only Mr. Kassner to try this case." Wendy went on in his affidavit to argue "that it would be unjust for this court to impose counsel on the defendant which is not of his choice," but did not claim that Harris would refuse to let Wendy represent him. Wendy did not support his affidavit with one by Harris. Moreover, Harris' alleged refusal to proceed with Wendy never was raised with Judge Goettel on December 13, 1976 as the basis for contemnor's refusal to obey the lawful order of the trial court.

Wendy's defense of his refusal to proceed with the trial in the District Court—and the *only* justification for his refusal that he offered during the first two days he was found in contempt—was that Kassner was better qualified to do so. Moreover, even if Harris had refused to permit Wendy to represent him, such an eleventh hour refusal still would not have excused Wendy from obeying the District Court's order. If Harris had rejected Wendy as his attorney, the trial court could have ordered Harris to trial, as scheduled, with or without Wendy's representation. See *United States v. Daniels*, 558 F.2d 122, 124-25 (2d Cir. 1977); *United States v. Lespier*, 558 F.2d 624, 628-29 (1st Cir. 1977); *United States v. Carroll*, 510 F.2d 507, 510 (2d Cir. 1975), *cert. denied*, 426 U.S. 923 (1976); *United States v. Sperling*, 500 F.2d 1323, 1337 n.19 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States v. Llanes*, 374 F.2d 712, 717 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967); *United States v. Bentvena*, 319 F.2d 916, 936 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963). Indeed, it is not uncommon in cases where a defendant expresses dissatisfaction with his attorney on the eve of trial for courts to allow the defendant to proceed *pro se* and to order the former attorney to sit with the defendant during the trial to provide assistance to the defendant when needed. See, e.g., *United States ex rel. King v. Schubert*, 522 F.2d 527, 529 (2d Cir.), *cert. denied*, 423 U.S. 990 (1975); *United States v. Calabro*, 467 F.2d 973, 984-87 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States v. Morrissey*, 461 F.2d 666 (2d Cir. 1972). Wendy was required to assist Harris at trial in whatever capacity—attorney or advisor—that the court ordered. While Harris' desire for another attorney may have made Wendy's task more difficult, compliance with the court's order would have been by no means impossible.

POINT II**Wendy's conduct warranted the civil contempt citations.**

Wendy argues that his conduct did not "rise to the level of contempt" (Br. at 15) because he intended no disrespect to the trial court and he did not evidence a reckless disregard of his professional responsibilities. Wendy's attempt to minimize on this record the gross dereliction of his professional responsibilities is a weak one.

At no time prior to December 10, 1976, did Dendy give the District Court reason to believe that an attorney other than himself would try the case or that there was even a remote possibility that the December 13 trial date was in jeopardy. Judge Goettel properly relied upon the fact of Wendy's position as exclusive trial counsel in setting a firm trial date—months earlier—which took account of the schedules of counsel, as well as of the busy District Court.* Moreover, Wendy knew from the pretrial conferences that the December 13 trial date was just within the limits imposed by the Speedy Trial Act. (App. at 31a). Notwithstanding these facts, Wendy waited until the very

* Wendy argues in his brief that the Clerk of the District Court apparently understood that the firm of Kassner and Detsky, and not Wendy specifically, represented Harris (Br. at 12). However, it was Judge Goettel's responsibility, not the Clerk's, to see to it that the *Harris* case proceeded in an orderly manner consistent with the demands of the District Court's schedule and the Speedy Trial Act. The practices of the Clerk's office have no bearing on what Judge Goettel reasonably was led to believe by Wendy prior to December 10—that Wendy was Harris' attorney for the trial. Cf. *United States v. Catino*, 562 F.2d 1, 4 n.2 (2d Cir. 1977). Wendy's attempt to fault Judge Goettel for not asking at the pretrial conferences who would be Harris' trial counsel (Br. at 12) is ridiculous in the extreme.

last working day before the trial date to inform the trial court that (1) Kassner was to participate in the trial, and (2) Kassner could not do so on December 13 because of a prior engagement.* By this conduct, Wendy effectively sought to favor his own convenience and private arrangements at the expense of the trial court's careful and fair attempt to conduct the proceedings in an orderly manner. When confronted with this alleged dilemma created by counsel, Judge Goettel properly took a course of action designed to protect the trial court's schedule by requiring Wendy to proceed with the Harris trial. This action was particularly appropriate here, as in *In re Sutter*, 543 F.2d 1030, 1035 (2d Cir. 1976), where counsel's conduct made him at least "guilty of recklessness"—a deliberate disregard of his responsibilities to the Court. See *United States v. Lespier*, 558 F.2d 624, 629 (1st Cir. 1977); *United States v. Marx*, 553 F.2d 874 (4th Cir. 1977); *Bell v. Hongisto*, 501 F.2d 346 (9th Cir. 1974); *United States v. Smith*, 436 F.2d 1130 (9th Cir. 1970); cf. *In re Allis*, 531 F.2d 1391 (9th Cir.), cert. denied, 429 U.S. 900 (1976); *In re Niblack*, 476 F.2d 930 (D.C. Cir.), cert. denied, 414 U.S. 909 (1973).**

* In fact, Wendy did not notify Judge Goettel of the potential conflict on December 6, 1976, when Kassner's state court trial began (App. at 36a), or even on December 9, when he first told the Assistant United States Attorney of the situation and the Assistant United States Attorney advised him to inform Judge Goettel. Instead, Wendy waited until December 10, which, in light of Wendy's determination to refuse to try the case, assured that the trial would be delayed and the court's calendar disrupted.

** See also 18 U.S.C. § 3162(b). This section of the Speedy Trial Act, which will become effective on July 1, 1979, 18 U.S.C. § 3163(c), provides the District Court with specific sanctions against an attorney who "wilfully fails to proceed to trial without justification consistent" with the Act's requirements for the commencement of trials. The sanctions include imposing a fine upon retained counsel. See also Section 5(f)(2) of the Plan of the United States District Court for the Southern District of New York for Prompt Disposition of Criminal Cases ("Neither a

[Footnote continued on following page]

Furthermore, Wendy's argument that his contumacious conduct was not wilful misconceives the nature of the contempt citation against him. As indicated earlier, see *supra* at 6-7, Wendy was held in civil, not criminal, contempt, and as such the fines imposed upon him had the intended purpose of coercing him into compliance with the court's order rather than punishing him for his wilful misconduct.* Thus, as inexcusable as were Wendy's actions leading up to the contempt citations—conduct which by itself would have justified a finding of criminal contempt—the citations were not directed to that conduct. Instead, the citations were a means of forcing Wendy to comply with the lawful orders of the District Court.** Judge Goettel thus properly exercised his power to protect "the orderly procedure in the courts . . . [and] the fair administration of justice," *United States v. Bentvena*, 319 F.2d 916, 936 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963), and to comply with the dictates of the Speedy Trial Act. The trial judge's actions clearly were within his discretionary powers. See *United States v. Lespier*, 558 F.2d 624, 628-29 (1st Cir. 1977); *United States v. Carroll*, 510 F.2d 507, 510 (2d Cir. 1975), *cert. denied*, 426 U.S. 923 (1976); *Bell v. Hongisto*, 501 F.2d 346 (9th Cir. 1974); *United States v. Smith*, 436 F.2d 1130

conflict in schedules of Assistant United States Attorneys nor a conflict in schedules of defense counsel will be ground for a continuance or delayed sitting except under unusual circumstances approved by the court and called to the court's attention at the earliest practicable time.")

* "[A] violation [of the court's order] need not be wilful for a party to be found in civil contempt." *NLRB v. Local 282, Teamsters*, 428 F.2d 994, 1001 (2d Cir. 1970); see *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).

** [C]ivil contempt lies for refusal to do a commanded act, while criminal contempt lies for doing some forbidden act. . . ." *Skinner v. White*, 505 F.2d 685, 688 (5th Cir. 1974).

(9th Cir. 1970); *United States v. Llanes*, 374 F.2d 712, 717 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967); *United States v. Bentvena*, 319 F.2d 916, 936 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963).^{*} The use of the civil contempt sanction in the circumstances of this case was clearly not an abuse of discretion.

^{*} *United States v. Lespier*, 558 F.2d 624 (1st Cir. 1977), lends strong support to the District Court's course of action in this case. In *Lespier*, the defendants' attorney of record, Mari Bras, notified the District Court three working days before the trial date that had been set months earlier that he could not appear at the trial because of his attendance at a political conference in Cuba. The District Court denied Mari Bras' motion for a continuance and ordered his co-counsel, Varela, who had handled most of the pre-trial proceedings, to try the case. Varela refused, claiming he did not know how to try a criminal case, and the defendants objected to Varela's representation. The District Court nevertheless ordered the trial to proceed. Varela sat through it without participating and the defendants were convicted. On appeal, the First Circuit commented as follows:

"Once the court had ruled that the trial should proceed, neither Varela nor appellants were justified in refusing to go forward. . . . Varela, if he remained as counsel, was obliged to put forward his best efforts notwithstanding his personal reservations. If he believed that the court had abused its discretion in denying a continuance until Mari Bras returned, the proper course was to preserve an objection for appeal. . . . There is no doubt that the trial judge had the power . . . to 'require attorneys to respect their obligation as officers of the court and enable the trial to proceed with dignity.' Sanctions available to the court include . . . citation for contempt. . . ." *Id.* at 629.

The Court of Appeals reluctantly reversed the defendants' convictions because "Varela's improper conduct left [them] without even the pretense of a competent defense," *id.*, and the District Court had not made a finding that the defendants had acquiesced and participated in Varela's conduct. Varela's improper conduct was his refusal to comply with the District Court's order and to try the case as best he could. Similarly, compliance by Wendy with the court's order in the instant case would have required him to "put forward his best efforts" to try the case. If Harris had been convicted despite Wendy's best efforts, Harris could then have asked this Court to review the constitutional adequacy of Wendy's representation.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

PAUL VIZCARRONDO, JR.,
ROBERT J. JOSSEN,
*Assistant United States Attorneys,
Of Counsel.*

★ U. S. Government Printing Office 1977—714-059-717

AFFIDAVIT OF MAILING

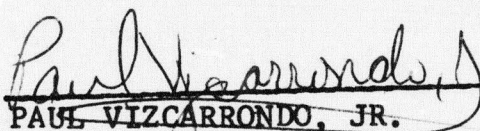
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

PAUL VIZCARRONDO, JR., being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 30th day of December, 1977,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

HOWARD WENDY, ESQ.
122 East 42nd Street
New York, NY 10017

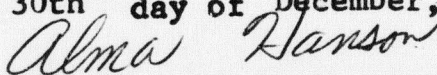
And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.



PAUL VIZCARRONDO, JR.

Sworn to before me this

30th day of December, 1977



ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24 6763450 Qualified in Kings Co.
Commission Expires March 30, 1978

